

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANIEL MCKELVEY,	)	
	)	
Plaintiff(s),	)	No. C10-1205 JSW (BZ)
	)	
v.	)	
	)	
SOS WHERIFY, LLC, GLOBETRACK)	)	<b>REPORT AND RECOMMENDATION</b>
WIRELESS, INC., and DOES	)	<b>RE PLAINTIFF'S MOTION</b>
1-50, inclusive,	)	<b>FOR DEFAULT JUDGMENT</b>
	)	
Defendant(s).	)	
_____	)	

Judge White has referred to me for a report and recommendation plaintiff Daniel McKelvey's motion for entry of default judgment against defendants SOS Wherify, LLC and Globetrack Wireless, Inc.<sup>1</sup> Doc No. 37. The Clerk entered the defendants default on December 9, 2010. Doc No. 35. Defendants did not respond to plaintiff's motion for default judgment, and did not appear at the April 6, 2011 hearing on the matter. The following is my report and recommendation for the entry of default judgment against defendants.

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<sup>1</sup> SOS-Wherify purchased the assets of GlobeTrack Wireless in September 2008.

1 Pursuant to FRCP 55(b)(2), the Court may enter a default  
2 judgment against a party whose default has been entered.<sup>2</sup> By  
3 their default, defendants are deemed to have admitted the  
4 well-pleaded averments of the complaint except those as to the  
5 amount of damages. FRCP 8(b)(6). The decision to grant or  
6 deny a default judgment under FRCP 55(b) is within the  
7 discretion of the Court. Eitel v. McCool, 782 F.2d 1470,  
8 1471-72 (9th Cir. 1986). Although a formal hearing is not  
9 required for the Court to render a default judgment, Davis v.  
10 Fendler, 650 F.2d 1154 (9th Cir. 1981), plaintiffs have the  
11 burden of proving damages through testimony, written  
12 affidavit, or other relevant evidence. See Bd. of Trs. of the  
13 Boilermaker Vacation Trust v. Skelly, Inc., 389 F.Supp.2d  
14 1222, 1226 (N.D. Cal. 2005).

15 Plaintiff worked as a consultant for defendants from  
16 November 1, 2007 to June 30, 2008. Plaintiff then signed a  
17 contract that beginning July 1 he would perform these same  
18 duties and responsibilities as CEO for defendants in exchange  
19 for a salary of \$150,000.00 per year. On April 10, 2009,  
20 defendants terminated plaintiff without ever compensating him  
21 for the services he provided. Plaintiff filed suit on July 8,  
22 2009, alleging that defendants breached the employment  
23 contract and violated several provisions of the California  
24 Labor Code and the Business and Professions Code by not paying  
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26 <sup>2</sup> The Court may not enter a default judgment against an  
27 unrepresented minor, an incompetent person, or a person in  
28 military service. See FRCP 55(b)(2); 50 App. U.S.C. § 521.  
Corporate defendants, however, are not subject to these  
limitations.

1 his wages. By their default, defendants have conceded that  
2 plaintiff's well-pled averments are true and thus admit that  
3 they have breached the employment agreement.<sup>3</sup> Liability for  
4 breach of the employment agreement having been established,  
5 the remaining issue is the relief available to the plaintiff.

6 For damages, plaintiff seeks \$200,000.00 for the 16  
7 months of employment services he provided. Under the  
8 employment agreement, plaintiff worked for nine months at the  
9 rate of \$150,000.00 per year, or \$12,500.00 per month, which  
10 amounts to \$112,500.00. By declaration, plaintiff testified  
11 that the value of plaintiff's seven months of work as a  
12 consultant, in which he performed similar services as when he  
13 was CEO, would be the same or \$87,500.00 for seven months,  
14 which I find reasonable. Accordingly, I recommend that  
15 plaintiff recover damages for unpaid wages in the total amount  
16 of \$200,000.00.

17 Plaintiff also seeks to recover his attorneys' fees and  
18 costs in this matter. Plaintiff's contract with his counsel  
19 provided for attorneys' fees in the amount of 30 percent of  
20 any recovery. McKelvey Declaration at ¶ 5. Plaintiff asks  
21 for this amount which he argues is supported by the "lodestar  
22 figure" of hours reasonably expended by his counsel on the  
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24 <sup>3</sup> In California, the elements required to prove a  
25 breach of contract claim are: (1) existence of a contract; (2)  
26 plaintiff's performance; (3) defendants's breach; and (4)  
27 resulting damages to the plaintiff. Reichert v. General Ins.  
28 Co. of Am., 68 Cal. 2d 822, 830 (1968). Plaintiff has shown  
that (1) defendants were contractually obligated to compensate  
plaintiff in the amount specified in the agreement; (2)  
plaintiff performed his obligations under the contract; (3)  
defendants failed to pay the wages due under the agreement; and  
that as a result, (4) plaintiff suffered damages.

1 case multiplied by a reasonable hourly rate. In a  
2 supplemental declaration, plaintiff submits that this lodestar  
3 figure is \$65,835.00 for 125.4 hours of work by his counsel at  
4 a blended billing rate of \$525.00 per hour. Righetti  
5 Supplemental Declaration at ¶ 4.

6 Plaintiff contends that he is entitled to attorneys' fees  
7 under California Labor Code §§ 1194 and 218.5. Section 1194  
8 provides relief, including attorneys' fees, for an employee  
9 who has been paid "less than the legal minimum wage or the  
10 legal overtime compensation applicable to the employee."  
11 Section 218.5 provides that an employee may recover attorneys'  
12 fees in an action for the nonpayment of wages. Plaintiff,  
13 however, is being awarded \$200,000.00 for breach of his  
14 employment contract with defendants and not because defendants  
15 failed to pay him the legal minimum wage or other wages under  
16 the Labor Code.<sup>4</sup> To rule that any successful breach of  
17 contract claim entitles a party to attorneys' fees under  
18 Section 218.5 would be tantamount to inserting an attorneys'  
19 fee clause into every employment contract, even when the  
20 parties have decided not to include one. Plaintiff has cited  
21 no authority that supports such a result. As to the Section  
22 1194 claim, plaintiff admitted that he is not seeking a  
23 minimum wage; he is seeking breach of contract damages. Thus,  
24 I recommend that plaintiff not be awarded attorneys' fees in  
25 this matter.

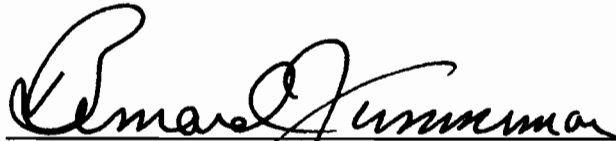
26 For the foregoing reasons, I recommend that judgment be

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28 <sup>4</sup> Plaintiff's contract with defendants did not include  
an attorneys' fees provision.

1 entered in plaintiff's favor against defendants for a total  
2 award of \$200,000.00.

3 Dated: June 20, 2011

4   
5 Bernard Zimmerman  
6 United States Magistrate Judge

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